No. 14,993

IN THE

United States Court of Appeals

For the Ninth Circuit

WILLIAM BERRYHILL,
Appellant,

vs.

PACIFIC FAR EAST LINE, INC., a Corporation,
Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

BRIEF OF APPELLANT.

DARWIN, PECKHAM & WARREN,
68 Post Street, San Francisco 4, California,
Attorneys for Appellant.

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STATEMENT OF JURISDICTION.

The appellant, a marine machinist's helper, sued the appellee in the Superior Court of California, in and for the City and County of San Francisco, to recover damages for personal injuries sustained by appellant when a grinding wheel shattered while he was engaged in his work aboard a vessel owned and operated by the appellee. The appellee removed the action to the United States District Court of the Northern District of California, Southern Division

(Certified File of Record on Appeal), pursuant to Title 28 USCA Section 1332, for diversity of citizenship. Thereafter, appellant filed an amended complaint (Tr. 3) to which the appellee answered (Tr. 8). Appellee's interrogatories (Tr. 15) were answered (Tr. 16). Appellee's motion for judgment on the pleadings (Tr. 20), was granted (Tr. 22, 24), and this appeal was then taken (Tr. 25).

JURISDICTION OF THE DISTRICT COURT.

The jurisdiction of the District Court is granted by the provisions of Title 28 USCA Sec. 1332, which vests jurisdiction in the United States District Courts of all civil actions where the amount in controversy exceeds $3000 and is between citizens of different states.

JURISDICTION OF THE COURT OF APPEALS.

The jurisdiction of this Court is granted by the provisions of Title 28 USCA Sec. 1291, which gives to the Court of Appeals jurisdiction of all appeals from final decrees of District Courts.

STATEMENT OF THE CASE.

The facts are disclosed by appellant's amended complaint (Tr. 3-7), and his answers to interrogatories (Tr. 16-20).

On December 20, 1953, the SS. FLYING DRAGON, a sea-going vessel owned and operated by the appellee, was docked for repairs in the County of Alameda, State of California. The repairs were to be made by Todd Shipyards Corporation (hereinafter referred to as Todd), pursuant to a contract entered into between Todd and the appellee. On that day, appellant, who was employed by Todd as a marine machinist's helper, was sent aboard the vessel, together with other Todd employees, to make the contracted for repairs, which were necessary for the ship to continue in the business of carrying cargo. About 10:30 A.M., that day, appellant was assisting one Vincent Solar, a marine machinist in the employ of Todd, to grind the vessel's shaft key way under the contract for repairs. In doing this repair work, Solar used a grinding tool to which was affixed one of several available grinding wheels. The grinding tool itself was furnished by Todd and brought aboard the vessel by Solar; the grinding wheels were on the vessel when appellant and Solar reported aboard for work, having apparently been left there by machinists who worked the preceding work shift.

While Solar was grinding the shaft keyway with appellant assisting, the grinding wheel, affixed to the grinder, exploded and shattered. Fragments of the wheel struck and injured the appellant.

Appellant's complaint (Tr. 3-7), as particularized by his answers to interrogatories (Tr. 16-20), alleges that his injuries were directly and proximately caused by appellee's failure to furnish him with safe

and seaworthy tools with which to perform his work —specifically, the grinding wheel was alleged to be unseaworthy.

SPECIFICATION OF ERRORS.

Appellant's specification of errors are set forth in his Statement of Points (Tr. 28):

(1) The Court erred in granting appellee's motion for judgment on the pleadings.

(2) The Court erred in holding that the appellant is not one to whom the doctrine of seaworthiness extends.

SUMMARY OF ARGUMENT.

An employee of an independent contractor who performs ship's service aboard ship, with the shipowner's consent or by his arrangement, is protected by the shipowner's traditional warranty of seaworthiness. The warranty of seaworthiness extends to the tools and equipment which are used to service the vessel. The shipowner cannot evade his warranty of seaworthy tools and equipment by arranging to have such tools and equipment furnished by an independent contracting employer of a shoreside worker.

ARGUMENT.

In sustaining appellee's motion for judgment on the pleadings, the Court stated that the "extension of the doctrine (unseaworthiness) to a shore side machinist injured while working on a vessel dry-docked for major repairs" (Tr. 23), did not apply.

The Court below did not indicate which factual circumstance was decisive upon the ruling upon the motion for judgment on the pleadings. Consequently it is necessary to consider the component facts in this case in relation to the applicable law.

EMPLOYEES OF INDEPENDENT CONTRACTORS WHO WORK IN THE SERVICE OF AND ABOARD A SHIP, WITH THE SHIPOWNER'S CONSENT OR BY HIS ARRANGEMENT, ARE COVERED BY THE SHIPOWNER'S TRADITIONAL WARRANTY OF SEAWORTHINESS.

The right of crew members to be furnished a seaworthy vessel, equipment, tools and gear, was extended to cover shore side workers in the landmark case of *Seas Shipping Company v. Sieracki,* 328 U.S. 85, 90 L.Ed. 1099 (1946).

In *Sieracki,* a stevedore, an employee of an independent contractor, was injured while loading cargo aboard a ship, when the shackle which supported the boom used in the loading operation, broke at its crown, causing the boom and tackle to fall upon the stevedore. The trial Court found that the shackle had a latent defect and absolved the defendant-shipowner of negligence. The United States Court of Ap-

peals for the Third Circuit reversed and held the shipowner liable for a breach of the warranty of seaworthiness, finding that the shackle used was unseaworthy, 149 F. 2d 98 (1945).

The Supreme Court (328 U.S. at page 95), in affirming the decision of the Court of Appeals, stated:

> "On principle we agree with the Court of Appeals that this policy (warranty of seaworthiness) is not confined to seamen who perform the ship's service under immediate hire to the owner, but extends to those who render it with his consent, or by his arrangement. All the considerations which gave birth to the liability and have shaped its absolute character dictate that the owner should not be free to nullify it by parcelling out his operations to intermediary employers whose sole business is to take over portions of the ship's work or by other devices which would strip the men performing its service of their historic protection."

In *Sieracki* therefore, the Supreme Court extended the shipowner's warranty that the vessel, its equipment, tools and gear, is seaworthy, to an employee of an intermediary employer, if such employee performs "portions of the ship's work" with the shipowner's "consent or by his arrangement."

The doctrine of the *Sieracki* case is not limited to longshoremen or stevedores engaged in loading or unloading cargo. It extends to all workers who meet the test established by the Supreme Court. An attempt to limit *Sieracki* to longshoremen and stevedores

engaged in loading and unloading the ship's cargo, was rejected by the Supreme Court in *Pope and Talbott, Inc. v. Hawn,* 346 U.S. 406, 98 L. Ed. 143 (1953).

Hawn, an employee of an independent contractor, was sent aboard the vessel to repair certain equipment used in loading operations. He was to adjust certain feeders used to load the vessel with grain. He was injured by falling into the hold of the vessel through an uncovered hatch. In rejecting the argument that the *Sieracki* doctrine was inapplicable to a repairman employed by an independent contractor, the Supreme Court stated at pages 412 and 413:

> "We are asked, however, to distinguish this case from our holding there (the Sieracki Case). It is pointed out that Sieracki was a 'stevedore'. Hawn was not. And Hawn was not loading the vessel. On these grounds, we are asked to deny Hawn the protection we held the law gave Sieracki. These slight differences in fact cannot fairly justify the distinction urged as between the two cases. Sieracki's legal protection was not based on the name 'stevedore' but on the type of work he did and its relationship to the ship and to the historic doctrine of seaworthiness. The ship on which Hawn was hurt was being loaded when the grain loading equipment developed a slight defect. Hawn was put to work on it so that the loading could go on at once. There he was hurt. His need for protection from unseaworthiness was neither more nor less than that of the stevedores then working with him on the ship or of seamen who had been or were about to go on a voyage. All were subjected to the same

danger. All were entitled to like treatment under the law."

Sieracki and *Hawn* were recently applied to a shoreside worker whose duties were analogous to the work performed by the instant appellant. In *Torres v. The Kastor, et al.,* 227 F. 2d 664 (C.A. 2, 1955), Torres, an employee of an independent contractor, was injured while working aboard the vessel pursuant to a contract of repairs between his employer and the vessel owner. Torres sued the shipowner whose contract with libelant's employer required the latter to clean the vessel of debris which followed the transportation of a cargo of loose pitch, and to make the vessel ready for general cargo. While cleaning the vessel, libelant's eyes were injured by the vessel owner's failure to supply libelant with a seaworthy place to work. In affirming judgment for libelant, the Court recognized that the vessel owner's duty to provide a safe place to work and a seaworthy vessel are "obligations now reaching to shoreworkers making repairs on a vessel" (*Torres v. The Kastor, et al.,* supra, at page 665).

Appellant herein was a marine machinist's helper, performing repairs aboard appellee's vessel. He was "actually working in the vessel in the repair of its shaft keyway and was rendering services necessary in the ship's business of carrying cargo" (Tr. 4, Complaint, paragraph IV). Appellant's work, like the work of *Hawn* and *Torres*, both supra, was a necessary step to make the vessel ready in all its parts and

appurtenances, for the stowage and transportation of cargo. Like *Hawn* and *Torres,* appellant, while so engaged in ship's work, was entitled to be furnished with a safe and seaworthy vessel, equipment, tools and gear.

THE SHIPOWNER'S WARRANTY OF SEAWORTHINESS INCLUDES TOOLS AND APPLIANCES USED IN THE PERFORMANCE OF SHIP'S SERVICE.

It is well established that tools and appliances used aboard a ship in its service are warranted seaworthy by the shipowner. *Mahnich v. Southern Steamship Co.,* 321 U.S. 96, 88 L.Ed 561 (1944).

In the instant case, the unseaworthy appliance was a grinding wheel. It was being used to repair and maintain the vessel and to make her ready to sail. There can be no question that if a seaman on ship's articles, while working in the machine shop, which is part of the engine room aboard a vessel, had been injured while using a defective grinder and wheel aboard ship, he would be entitled to indemnity for his injuries. Since appellant was engaged in the repair of ship's gear he is entitled to the same warranty of seaworthiness of appliances, applicable to a seaman.

THE SHIPOWNER CANNOT ESCAPE HIS OBLIGATION TO FURNISH SEAWORTHY TOOLS TO SHORESIDE WORKERS MERELY BY ARRANGING TO HAVE SUCH TOOLS FURNISHED BY THE INDEPENDENT CONTRACTING EMPLOYER OF THE SHORESIDE WORKERS.

It is well settled that a shipowner cannot escape his warranty of seaworthiness by having equipment and gear necessary to perform the ship's service, supplied by an independent contractor.

In *Petterson v. Alaska Steamship Company,* 205 F2d 478, (CA-9, 1953), this Court held that the defendant shipowner was responsible for the unseaworthiness of equipment brought aboard its vessel by the independent contractor in furtherance of the ship's work to be performed by the contractor. In *Petterson,* a stevedore was injured when a snatch block which was brought aboard by his employer, broke. The District Court denied recovery because it was not shown that the block belonged to the ship nor that it was part of its equipment. Plaintiff contended that liability should be imposed, even though the equipment belonged to his employer and was not part of the ship's equipment. The trial Court rejected this contention, on the ground that the *Sieracki* case did not go so far, even though the Court found that the block was used in a "customary and usual manner" in that it was "of a type ordinarily customarily used and proper for the use to which it was put upon the location in question." This Court accepted the trial Court's finding of fact regarding the condition and use of the block, but nevertheless held that since the block would not have broken unless it was defective, it was,

herefore, unseaworthy. It reversed the trial Court with instructions for further proceedings for a determination of damages. Upon application of Alaska Steamship Company, the Supreme Court granted certiorari, and in a per curiam opinion, *Alaska Steamship Company v. Petterson,* 347 U.S. 396, 74 S.Ct. 601 (1954), affirmed the decision of this Court, citing as authority the *Sieracki* and *Hawn* cases. The significance of this decision and its applicability to the instant case is underscored by the dissent of Mr. Justice Burton with which Mr. Justice Frankfurter and Mr. Justice Jackson joined. The dissent conceded that the effect of the action by the majority was to require the shipowner to warrant the seaworthiness of equipment owned and used aboard the ship by the independent contractor in furtherance of the contracted work.

The latest case in the Supreme Court, *Rogers v. U. S. Lines Co.,* 347 U.S. 984, 74 S.Ct. 849 (1954), reaffirmed the principles of law beginning with *Sieracki.* The Court dispelled any doubt as to the implication of Petterson, by holding that the doctrine of seaworthiness extends to equipment used in the service of the vessel no matter by whom furnished.

Rogers was a stevedore employed by an independent contractor who was sent aboard one of the defendant's vessels to assist in loading cargo. His employer, the independent contractor, furnished a runner to be used on one of the vessel's winches for unloading purposes. This runner was defective and caused Rogers to be injured. The Court of Appeals for the Third Circuit,

denied plaintiff recovery, as the evidence indicated that the unseaworthy runner was not furnished by the shipowner but rather by the independent contractor, 205 F2d 57 (CA-3, 1954). The Supreme Court in granting certiorari, underscored the effect of its decision in the *Petterson* case by its brevity in deciding as follows:

> "June 1, 1954. Per Curiam. The petition for writ of certiorari granted and the judgment is reversed."

CONCLUSION.

The order below should be reversed.

Dated, San Francisco, California,
May 9, 1956.

Respectfully submitted,
DARWIN, PECKHAM & WARREN,
Attorneys for Appellant.